Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–185 OF 2002
GOPAL SRI RAM, PS GILL AND RAHMAH HUSSAIN JJCA
6 JUNE 2003

Contract *— Misrepresentation — Sale and purchase of property — Nature of misrepresentation — Consequence of misrepresentation — Whether damages should be awarded — Contracts Act 1950 s 19*

The defendant is a limited company keen on acquiring land to build a factory. The land in question was owned by the plaintiff. A representation was made by the estate agent that the land had access to the main road, a fact that was later discovered to be untrue. The defendant refused to complete the agreement on this ground and the plaintiff brought an action claiming that the defendant had repudiated the sale and purchase agreement. The defendant defended the action on the ground that the agreement had been vitiated by the agent's misrepresentation. The issue for consideration was what type of representation was made and whether damages should be awarded as a consequence thereof.

Held, allowing the appeal:

(1) The expression 'misrepresentation' is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. It does not however reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent, negligent or entirely innocent — that is to say a product of a mind that is free of deceit (see p 468A–B).

(2) On the facts of the case, the defendant pleaded neither fraud nor negligence. All it pleaded was the misrepresentation about the access to the land. In the absence of a specific and particularized plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation (see p 471F–G).

(3) A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages. This principle is cased on the historical antecedent that a court of equity will only decree specific relief but not damages, the latter being the sole relief that courts of common law will grant (see p 470A–B).

(4) Applying these principles, the defendant is entitled only to rescission and to the return of the deposit of RM254,204 but not to the interest on such sum. This is because awarding interest would amount to compensating the defendant for the loss of the use of his money while it was in the plaintiff's hands and this would amount to damages (see pp 471H–472A).

A **[Bahasa Malaysia summary**

Defendan adalah sebuah syarikat berhad yang berhasrat untuk memperoleh tanah untuk pembinaan sebuah kilang. Tanah yang dipersoalkan dimiliki oleh plaintif. Satu representasi telah dibuat oleh ejen hartanah di mana tanah tersebut mempunyai akses ke jalan
B utama, satu fakta yang kemudiannya didapati tidak benar. Defendan enggan untuk menyelesaikan perjanjian tersebut atas alasan ini dan plaintif telah memulakan satu tindakan mendakwa bahawa defendan telah membatal perjanjian jual beli tersebut. Defendan telah membela tindakan tersebut atas alasan perjanjian tersebut adalah tidak sah disebabkan oleh salah nyata ejen tersebut. Persoalan untuk
C dipertimbangkan adalah jenis representasi yang dibuat dan sama ada ganti rugi patut diawardkan akibat daripada itu.

Diputuskan, membenarkan rayuan tersebut:

D (1) Istilah 'misrepresentation' hanya menggambarkan satu pernyataan palsu pra-kontraktual yang mempengaruhi satu kontrak atau transaksi yang lain. Ia tidak bagaimanapun menggambarkan keadaan minda orang yang memberikan kenyataan pada masa berkaitan. Keadaan minda orang yang memberikan kenyataan pada masa ia membuat representasi
E tersebut kepada orang yang menerima kenyataan tersebut berbeza menurut keadaan setiap kes. Ia mungkin berunsur fraud, cuai atau seikhlasnya – di mana satu hasil minda yang bebas daripada penipuan (lihat ms 468A–B).

(2) Berdasarkan fakta-fakta kes, defendan tidak memplidkan fraud
F maupun kecuaian. Apa yang ia memplidkan adalah salah nyata tentang akses kepada tanah tersebut. Dengan ketiadaan satu pli yang spesifik dan terperinci tentang fraud atau kecuaian, defendan hendaklah dianggap menegaskan satu kes atas salah nyata ikhlas (lihat ms 471F–G).

(3) Seorang yang menerima kenyataan yang dipengaruhi oleh satu
G salah nyata ikhlas boleh menyaman untuk pembatalan dan pembatalan seterusnya; tetapi beliau tidak boleh mendapat ganti rugi. Prinsip ini adalah menurut sejarah terdahulu di mana sebuah mahkamah ekuiti hanya akan mendekrikan perlaksanaan spesifik dan bukan ganti rugi, yang merupakan satu-satunya relief
H yang diberikan oleh mahkamah-mahkamah common law (lihat ms 470A–B).

(4) Dengan memakai prinsip-prinsip tersebut, defendan hanya berhak kepada pembatalan dan pengembalian deposit sejumlah RM254,204 dan bukan terhadap faedah jumlah tersebut. Ini adalah kerana dengan mengawardkan faedah adalah seperti
I memberi pampasan kepada defendan untuk kerugian menggunakan wang beliau walhal ia berada dalam tangan plaintif dan ini membentuk ganti rugi (lihat ms 471H–472A).]

Notes

For cases on sale and purchase of properties under misrepresentation, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3316–3319.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500 (refd)
Doyle v Olby (Ironmongers) Ltd [1969] 2 All ER 119 (refd)
Dunbar Bank plc v Nadeem [1998] 3 All ER 876 (refd)
Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465 (refd)
Kuppuswami Chettiar v Arumugam Chettiar AIR 1967 SC 1395 (refd)
Nursey Spinning and Weaving Co Ltd, In re (1881) ILR 5 Bom 92 (refd)
Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769 (refd)
Weber v Brown [1908] 1 FMSLR 12 (refd)

Legislation referred to

Contract Act 1872 [India] s 18
Contracts Act 1950 ss 18, 19(1)
Evidence Act 1950 s 92, proviso (a), illustration (d)
Misrepresentation Act 1967
Specific Relief Act 1950 s 37

Appeal from: Suit No S2–F22–208 of 1986 (High Court, Kuala Lumpur)

Porres P Royan (*Philip Choong* with him) (*Philip Choong & Co*) for the appellant.
Neoh Poh Cheng (*Suhaimi Khor Zulkifli & Chang*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This is quite a simple case. But it has become utterly confused because of the way in which the plaintiff presented its case in the court below.

For convenience, we will refer to the parties according to the title assigned to them in the court below. This is the defendant's appeal.

The essential facts of this case are as follows.

The defendant is a limited company. It was keen on acquiring land to build a factory. It saw an advertisement in a newspaper placed by an estate agent — a Mr TK Wong, carrying on business as Wong Tai Kong Realty — whom we will refer to as 'Wong'. The advertisement referred to certain land at the Jalan Kelang Lama area as being available for purchase. The land in question was owned by the plaintiff. By pre-arrangement, the defendant's representatives visited the land. Wong accompanied them. There was some discussion about the availability of access to the land in question. As found by the learned trial judge — a finding of fact that is accepted by both sides

before us — Wong represented to the defendant's representatives that the land had access to the main road. This was an important fact because, absent access, the land was worthless to the defendant. Following negotiations, the parties entered into a written sale and purchase agreement pursuant to which the defendant paid a deposit of RM254,204. It later transpired that the land in question had no access. The defendant refused to complete on this ground. The plaintiff then filed a writ action claiming a declaration that the defendant had repudiated the sale and purchase agreement. The defendant defended the action on the ground that the agreement had been vitiated by Wong's misrepresentation. And it therefore counterclaimed for rescission.

At the trial, each side formulated the issues that each considered necessary for its case. The issue common to both sides was whether Wong had made the representation regarding access to the land. As we said a moment ago, the judge held that the representation had been made. The defendant raised two further issues. In a gist, they amount to whether there was, on the evidence, an actionable misrepresentation. For its part, the plaintiff raised an additional issue which led the learned judge astray and produced the confusion that has obfuscated the true issues of law that lie at the heart of this appeal. That issue was put by those having conduct of the plaintiff's case as follows:

> Whether the defendant can use the alleged representation to contradict, vary, add to, or subtract from, the terms of the agreement and supplementary agreement in contravention of ss 91 and 92 of the Evidence Act 1950?

With great respect to the plaintiff's solicitors, this question bears no relevance whatsoever to the issue as disclosed upon the joinder in the pleaded cases of the respective parties. At the risk of repetition, we will recall what that issue is. On the one side, you have the plaintiff seeking to enforce the agreement. On the other side, you have the defendant seeking to avoid the agreement for misrepresentation. So, what the court below had to decide was whether a case of actionable misrepresentation had been made out on the evidence. If yes, then the agreement would have to be set aside, barring the presence of any facts that would go to the exercise of discretion against the grant of equitable relief. If no, then the agreement would be very much alive and the defendant would be under an obligation to fulfill its terms.

Whether a party to a contract may vary or contradict its terms is an issue that goes to the interpretation of the contract, that is to say, its meaning and not its validity. Conversely, the effect of a misrepresentation upon a contract goes to its validity and not its meaning. Put another way, it is not permissible to look at matters extrinsic to a contract to discover its meaning. However, if the contract itself is the product of an extraneous fact, such as an actionable misrepresentation, then, it is invalid, and for that reason, evidence of the particular misrepresentation may be admitted in evidence.

Section 92 of the Evidence Act 1950 which houses the general rule against the admissibility of extrinsic evidence when construing bilateral instruments such as contracts recognizes the distinction between

interpretation and validity by enacting the following exception in its proviso (a) which reads:

> any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law

That the instances of vitiating elements appearing in the proviso include misrepresentation is made clear by illustration (d) to s 92. That illustration reads:

> A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

It is the failure on the part of the plaintiff's legal advisers to fully appreciate this rather elementary distinction between interpretation and validity prescribed by the law of contract that has caused much of the confusion in this case.

In the present instance, the learned judge after having concluded that Wong had made the representation about the access, went on to consider whether it was open to the defendant to now complain about the proved lack of such access. He dealt with the case on the footing that it had to do with the construction of the agreement. After referring to s 19 of the Contracts Act 1950 (which we will deal with later) the learned judge expressly ruled out any question of avoidance of the agreement by the defendant. Instead, he held the real question to be whether Wong's representation could be regarded as a term of the contract between the parties. According to the learned judge, since the defendant has had the advantage of advice from more than one professional source, a term as to the access would have been incorporated into the written agreement. Since this was not done, it was no longer open to the defendant to complain about the admitted or at least proved lack of access to the land in question. He therefore held that Wong's representation could not be read into the agreement and on that basis gave judgment for the plaintiff and dismissed the counterclaim.

With respect, we find ourselves unable to agree with the learned judge's approach — an approach suggested to him in error by the plaintiff's counsel. Once the learned judge found that Wong had made the representation about the availability of access, it was incumbent upon him to proceed and determine whether this amounted to an actionable misrepresentation. Indeed this was the substantial case raised by the defendant. With respect, it was incumbent for the learned judge to have dealt with it. However, the learned judge, for reasons not stated in his judgment, altogether ignored the case pleaded by the defendant and the issues raised by it. Instead he treated the issues raised by the plaintiff as being the sole questions requiring determination. The defendant was therefore shut out from having his answer to the plaintiff's claim from being

tried. This is contrary to elementary rules of procedural fairness which require that a party who raises a point of substance, either in support of his or her claim or by way of defence, is entitled to have the court's view upon it. Since the learned judge adopted an erroneous approach to the case, it falls upon us to deal with the point based on the findings of fact made by the judge.

Now the elements of an actionable misrepresentation are well settled. They are set out as follows in Professor McKendrick's *Contract Law* (3rd Ed), a leading work on the subject:

> A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract. This definition may be broken down into three distinct elements. The first is that the representation must be an unambiguous false statement of fact, the second is that it must be addressed to the party misled and the third is that it must be a material inducement to entry into the contract.

Section 18 of our Contracts Act 1950, defines 'misrepresentation' as follows:

> 'Misrepresentation' includes —
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> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
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> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
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> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

This section is ipsissima verba s 18 of the Indian Contract Act 1872. It is to be noted at once that the definition in that section is inclusive or open-ended and not exclusive. Hence, the circumstances set out under each of its three paragraphs are not the only instances of misrepresentation to which the section is confined. In our judgment, it is the duty of a court to find the facts and then determine whether those facts fall within one or more of the three paragraphs under s 18. If they do, then the statement complained of is an actionable misrepresentation. This is the approach adopted in one of the leading cases on the section.

In *In re Nursey Spinning and Weaving Co Ltd* (1881) ILR 5 Bom 92, at p 97, Sargent J said:

> Now here we have the Company by their Directors acting in their authority, and admittedly in perfect assurance, selling a bill to the Bank on behalf of the Company as a bill upon which the Company was liable, which, however, turns out to be one upon which the Company was not liable. I say, acting within their authority, for the transaction was in its very nature, and was understood by the Bank to be, one for the purpose of raising money for the Company, as provided by clause 102 of the Articles of Association; and, indeed, it was, I think, admitted to be one of the ordinary modes by which spinning and

> weaving companies, in the course of their business, anticipate the sales of their yarn and piece-goods exported to the China markets. The only difference between the cases I have referred to and the present case is that, in the former, the bill sold was different from what, on the face of it, it purported to be, while in this case it is different from what it was expressly represented to be by the agents of the Company in the ordinary course of business which they were authorized to transact. In all three cases what was sold was different from what the vendor professed to sell; in other words, there was a misrepresentation within the meaning of section 18 of the Indian Contract Act, which, coupled with section 19, provides that a contract shall be voidable when there has been a misrepresentation, 'causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.' It was said that the exception to section 19, which excludes from the operation of the section the case where the party whose consent was obtained by misrepresentation had the means of discovering the truth with ordinary diligence, is applicable to the present case. But no ordinary diligence would have enabled the Bank to discover that the Company was not liable on this bill.

We will in due course express our views on s 19 of the Contracts Act (referred to in the foregoing passage) and in particular the applicability of the Exception to that section to the facts of this case. For the present, however, we would merely observe that in the instant appeal, as happened in Nursey's case, the very thing that was transacted, namely, the land in question was represented to be something very different from what it actually was. The plaintiff's authorized agent (Wong), as found by the learned judge, expressly represented the land as having access. The truth was quite the contrary. It is therefore difficult to envisage a clearer case of an actionable misrepresentation than the present.

> We now turn to s 19 of the Contracts Act 1950 which reads:
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> (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
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> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.
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> Exception — If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.
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> Explanation — A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

It is clear from s 19(1) that it reproduces the English common law whereby a misrepresentation, whether innocent or fraudulent, would entitle the innocent party to rescind a contract. The Explanation to s 19(1) enacts the common law requirement that the misrepresentation must induce the contract. Now we think that we should say a word about this point. It has to do with the onus of proof. As a general rule, the burden is on a

representee to show that the misrepresentation induced him to enter into the contract (see *Kuppuswami Chettiar v Arumugam Chettiar* AIR 1967 SC 1395. But this general rule should not be taken too far. This is because in a particular case:

> Where the defendant has made a material misrepresentation calculated to induce the plaintiff to act as he or she has acted, and where the loss is consistent with the plaintiff having acted on the misrepresentation as alleged, the *legal burden of proof shifts* to the defendant to prove that the plaintiff did not rely, at all, on the misrepresentation (per Finch J in *Sidhu Estate v Bains* [(1996–06–07) BCCA V02469], citing Anderson JA in *Parallels Restaurant Ltd v Yeung's Enterprises Ltd* (1990), 4 CCLT (2d) 59. See also, *Redgrave v Hurd* [1881] 20 ChD 1. (Emphasis added.)

In the present instance, there is abundant evidence from which the judge — and indeed any reasonable tribunal armed with the facts — was entitled to infer that Wong's representation about the availability of access to the land had induced the defendant to enter into the contract with the plaintiff. And for good measure it may be added that there was nothing in the plaintiff's case that went the distance to rebut that inference. Accordingly, we are of the view that there can be no doubt whatsoever that on the facts of this case the misrepresentation did in fact induce the defendant to enter into the contract with the plaintiff.

Thus, applying s 19(1) to the facts, the instant defendant would prima facie be entitled to avoid the contract unless its case falls within the Exception. On the facts of the instant appeal, it is not necessary for us to deal with the Exception. This is because it was not part of the plaintiff's pleaded or argued case that the defendant was not entitled to rescind the agreement on the ground that the latter had — to use the statutory formula — 'the means of discovering the truth with ordinary diligence'. In any event, there is not a shred of evidence was led to show that the defendant had the means of discovering with ordinary diligence that the land in question did not have access and yet entered into the transaction with its eyes wide open. So, again, as a matter of evidence, the Exception has no application to the facts of this case. But we should point out that the relevant cases that have considered the Exception are all collected in the leading Malaysian text on the subject, *Sinnadurai on The Law of Contract* (3rd Ed), pp 232–234. Despite some obvious errors (see, for example, the narrative of the facts of *Weber v Brown* [1908] 1 FMSLR 12) we have gained valuable assistance from Dr Sinnadurai's work.

There is one other point in this case which we have to deal with. It has to do with the remedies availability of the remedies sought by the defendant in its counterclaim. We will address these a little later in this judgment. What is of moment is that the nature of the remedy available to the instant defendant depends entirely on the kind of misrepresentation alleged against the plaintiff. Now, although this court in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* and another appeal [1999] 2 MLJ 500 discussed some of the relevant principles in this area of the law, we think it useful to restate them as the issue has arisen acutely for decision in this case.

Now, it is trite that the expression 'misrepresentation' is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of a mind that is free of deceit and inadvertence (see *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd.* Put another way, a misrepresentation is innocent 'where the representor believes his assertion to be true and consequently has no intention of deceiving the representee.' (*Chesire & Fifoot, Law of Contract* (6th Ed)). It is the particular state of mind of the representor that determines the nature of the remedy available to the representee. So, if the misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement.

The relevant law governing the measure of damages for fraudulent misrepresentation is set out in the judgment of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119. He said:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
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> > 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.'
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> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

Doyle v Olby (Ironmongers) Ltd was approved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769. Lord Browne-Wilkinson said (at p 777):

> *Doyle v Olby (Ironmongers) Ltd* establishes four points. First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (ie caused by) entering into the transaction. Second, that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account

A the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it. Third, damages for deceit are not limited to those which were reasonably foreseeable. Fourth, the B damages recoverable can include consequential loss suffered by reason of having acquired the asset.

In my judgment *Doyle v Olby (Ironmongers) Ltd* was rightly decided on all these points. It is true, as to the second point, that there were not apparently cited to the Court of Appeal the nineteenth century cases which established the 'inflexible rule' that the asset acquired has to be valued as at the C transaction date: the successful appellant was not legally represented. But in my judgment the decision on this second point is correct. The old 'inflexible rule' is both wrong in principle and capable of producing manifest injustice. The defendant's fraud may have an effect continuing after the transaction is completed, eg if a sale of gold shares was induced by a misrepresentation that a new find had been made which was to be announced later it would plainly be wrong to assume that the plaintiff should have sold the shares before the D announcement should have been made. Again, the acquisition of the asset may, as in *Doyle v Olby (Ironmongers) Ltd* itself, lock the purchaser into continuing to hold the asset until he can effect a resale. To say that in such a case the plaintiff has obtained the value of the asset as at the transaction date and must therefore bring it into account flies in the face of common sense: how can he be said to have received such a value if, despite his efforts, he has E been unable to sell.

If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465. In such a case, the representee must F plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence. So far as the relevance of the tort in relation to pre-contractual and contractual statements is concerned, we would quote with approval the following passage from *Sinnadurai on the Law of Contract* (3rd Ed) at p 243:

G Under English Law, until the decision of the House of Lords in decision *Hedley Byrne & Co Ltd v Heller and Partners Ltd*, innocent misrepresentation included negligent misrepresentation. However since *Hedley Byrne* and the coming into force of the Misrepresentation Act 1967, there appears now to be a distinction between negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation is generally confined to cases H where a duty is imposed to take care in making statements. Such a duty may arise under a contract, where the parties stand in a fiduciary relationship: *Nocton v Ashburton* [1914] AC 932 or out of a 'special relationship': *Hedley Byrne*. Where a special relationship exists, a negligent misstatement may not only be a breach of contractual warranty, but also an actionable tort as a breach of the duty which exists throughout pre-contractual negotiations until I making of the final contract. In *Selangor United Rubber Estates Ltd v Cradock & Ors* [1965] 1 Ch 896 the court held that where a plaintiff alleged a breach of duty arising from any given relationship, he has to specify with precision the relationship under which the duty arose; in this case it was not clear whether

the plaintiff was alleging the ordinary relationship of banker and customer or some other special relationship.

In the case of an innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in that country. A representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages. This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Courts of Common Law will grant.

There is a world of difference between the two remedies, namely, an indemnity, or more appropriately, restitution (see *Goff & Jones, The Law of Restitution* (5th Ed) at p 287, fn 48) and an award of damages for misrepresentation. That difference is dealt with in *Cheshire and Fifoot on the Law of Contract* (6th Ed) at p 240) from which we quote:

> The overriding rule that damages are irrecoverable for an innocent misrepresentation forming no part of the contract has led, however, to a somewhat subtle distinction between indemnity and damages. There is no right in the plaintiff to have the status quo restored in toto; no right to an indemnity against *every* obligation that he may have incurred as a result of the contract. Otherwise there would be no difference between indemnity and damages. In the words of Bowen, LJ (in *Newbigging v Adam* (1886) 34 Ch D 582, 594):
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> > 'I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place on the words "out of the contract" the limited and special meaning which I have endeavored to shadow forth. Loss arising out of the contract is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done.'
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> To what obligations, then, does the indemnity relate? The answer is that the plaintiff must be indemnified, not against all obligations even though they may be correctly described as having arisen under, or out of or as a result of the contract, but only against those necessarily created by the contract. The burden must be one that has passed to the representee as a necessary and inevitable result of the position which he assumed upon completion of the contract.
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> If, for example, A procures the dissolution of his partnership with B and C on the ground of innocent misrepresentation, he nevertheless remains personally liable for partnership debts contracted while he was a member of the firm. His position as partner was created by the contract and it is the inevitable and automatic result of having occupied this position that he is now burdened with liability for debts. Hence they are a proper subject for an indemnity.

It follows that the victim of an innocent misrepresentation, is not to be put in exactly the same position as if the representation had never been made. For, that would result in an award of damages. All that is required is that

A the representee be returned to his position only so far as regards the rights and obligations which have been created by the contract into which he was induced to enter. The interface of the remedies of rescission and restitution produces this result.

Thus, in *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, at p 886, B Morritt LJ said:

> The applicant for an order for a transaction to be set aside on the ground of undue influence or for any other invalidating tendency, as they were described by *Lord Browne-Wilkinson in Barclays Bank plc v O'Brien* [1993] 4 All ER 417 at 424, must as a condition for relief give back all he obtained from the transaction (see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas C 1218). The matter was put clearly by Bowen LJ in *Newbigging v Adam* (1886) 34 Ch D 582 at 592 where he said:
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> > '... when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such D rescission. It is said that the injured party is entitled to be replaced in statu quo. *It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in statu quo with this limitation—that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been* E *created by the contract into which he has been induced to enter.* That seems to me to be the true doctrine, and I think it is put in the neatest way in *Redgrave v Hurd* ((1881) 20 Ch D 1).'
>
> In the later passage to which I referred, Bowen LJ added (at p 595):
>
> > 'There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations F which the contract has created, as well as the giving back and the taking back of the advantages.' (Emphasis added.)

We now return to the present appeal to determine the remedies that the defendant is entitled to have.

It is clear that the defendant's pleaded case alleges neither fraud nor G negligence. All that the defendant has pleaded is the misrepresentation about the access to the land. Absent a specific and particularized plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation in the sense already discussed.

In its pleaded case, the defendant has sought, inter alia, the following H relief, namely: (i) rescission; (ii) return of the deposit of RM254,204; (iii) interest on the sum of RM254,204; and (iv) damages.

Applying the principles discussed earlier to the facts of the present instance, it is our judgment that the defendant is entitled only to rescission and to the return of the deposit of RM254,204. These are the two items that would replace the defendant in its position — to borrow the words of Bowen I LJ — 'so far as regards the rights and obligations which have been created by the contract into which [it] has been induced to enter'. The defendant is not entitled to interest on the sum of RM254,204. To award interest would

amount to compensating the defendant for the loss of the use of his money while it was in the plaintiff's hands. This, in our view, would amount to an award of damages. We would add *ex abundanti cautela* that none of the discretionary bars to rescission were raised by the plaintiff. In any event, they do not apply to the facts of the present instance. Neither is there any need for any equitable adjustment under s 37 of the Specific Relief Act 1950 as the defendant did not, on the facts, obtain any advantage or benefit under the voidable transaction.

For the reasons already given, the appeal is allowed. The orders of the High Court are set aside. The plaintiff's claim is dismissed. The following relief is granted to the defendant on its counterclaim: (i) rescission is decreed and the sale and purchase transaction entered into between the plaintiff and the defendant in respect of the subject land is hereby set aside; and (ii) judgment is entered for the defendant in the sum of RM254,204. The costs of this appeal and of the proceedings in the High Court must be borne by the plaintiff. The deposit lodged in court shall be refunded to the defendant.

Appeal allowed.

Reported by Mariette Peters-Goh